



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/743,732	12/24/2003	Stephen Carley	39685-0040	9110

26633 7590 07/01/2004

HELLER EHRMAN WHITE & MCAULIFFE LLP
1666 K STREET,NW
SUITE 300
WASHINGTON, DC 20006

EXAMINER

WACHSMAN, HAL D

ART UNIT PAPER NUMBER

2857

DATE MAILED: 07/01/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/743,732	Applicant(s) CARLEY, STEPHEN	
	Examiner Hal D Wachsman	Art Unit 2857	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 24 December 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4, 9-14 and 18-21 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4, 9-14 and 18-21 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 24 December 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>12-24-03</u> . | 6) <input type="checkbox"/> Other: _____ |

1. The application records show that this application was filed as a divisional of U.S. application serial no. 09/906,288. However, as there was no restriction in the parent case 09/906,288 there is some ambiguity as to the basis for the instant application being a divisional of 09/906,288 as opposed to being a continuation of the parent case 09/906,288. Appropriate explanation is required.
2. The Abstract is objected to because it contains purported merits (i.e. "The technique exposes subtle deviation..."). Appropriate correction is required.
3. The Preliminary Amendment filed 12-24-03 has the specification amendment "Please renumber the remaining paragraphs." which is an improper amendment under 37 C.F.R. 1.121 which cannot be entered. Thus, correction of the paragraph numbering is still needed. In addition, the Preliminary Amendment has an insertion of a statement of continuing data to go after the title and before "Technical Field" on page 1 of the specification. However, in between the title and "Technical Field" on page 1 of the specification there is "Inventor: Stephen Carley". Consequently, it appears that the correct location for the insertion to go would be after the line with the inventors name and before "Technical Field". In addition, the statement of continuing data does not provide the current status of U.S. application serial no. 09/906,288. Appropriate correction is required.
4. The disclosure is objected to because it contains an embedded hyperlink and/or other form of browser-executable code (see paragraphs 0007 and 0073). Applicant is required to delete the embedded hyperlink and/or other form of browser-executable code. See MPEP 608.01.

5. The following grammatical errors in the specification are respectfully noted:

Paragraph 0051, line 3, "anything greater **that** 1 standard"

Paragraph 0060, line 3, "is will understood";

6. The use of the trademark RealMedia (paragraph 0021) has been noted in this application. It should be capitalized wherever it appears and be accompanied by the generic terminology.

Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner which might adversely affect their validity as trademarks.

7. In paragraph 0006 of the specification, "HTML" needs to be defined. In paragraph 0007, "DNS" needs to be defined. Appropriate correction is required.

8. Claims 1-4, 9-14 and 18-21 are objected to under 37 C.F.R. 1.75(a) for failing to particularly point out and distinctly claim the subject matter which the applicant regards as the invention. Claim 1, line 3, cites "a first plurality of measurements" however as there is not later on a second plurality of measurements it is not clear why this is being called a first plurality. This same type of problem also occurs in claim 10, line 2, claim 21, line 3. Claim 1, line 10, cites "the first set of measurements" however the antecedent basis is "at least a first set of measurements". This same type of problem also occurs in claim 10, lines 8-9, claim 11, line 5, claim 13, line 2, claim 20, lines 8-9, claim 21, line 10. Claim 1, lines 12 and 13, cite "the first variance statistic" however the antecedent basis is "at least a first variance statistic". This same type of problem also occurs in claim 21, line 8. Claim 2, lines 2-3, cite "each of the first set of measurements"" which it

appears should be "each measurement of the at least a first set of measurements".

Claim 10, line 10, cites "at least the second variance statistic" which it appears should be "the at least a second variance statistic". Claim 18, line 5, cites "the second variance statistic" which it appears should be "the at least a second variance statistic". This same type of problem also occurs in claim 19, line 2. Claim 20, line 3, cites "each of the first plurality of measurements" which it appears should be "each measurement of the first plurality of measurements". Claim 20, line 10, cites "the second variance statistic" which it appears should be "the at least a second variance statistic". Claim 21, line 11, cites "at least the first variance statistic" which it appears should be "the at least the first variance statistic". The examiner asks the applicant to better claim the limitations cited above. While the examiner understands the intentions of the applicant he feels confusion could be drawn from the limitations cited above. Appropriate correction is required.

Claim Rejections - 35 USC § 102

9. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

10. Claims 1-4, 9-14 and 18-21 are rejected under 35 U.S.C. 102(a) or 102(b) as being anticipated by "Variance of Aggregated Web Traffic" (Morris et al.).

As per claim 1, Morris et al. (page 360 section II, pages 361 sections II and III, page 364 section V) disclose "at least one data collection agent (DCA) located on a network and which collects performance data....each measurement of the first plurality of measurements taken at a different time". Morris et al. (page 361 section III, pages 361-364 section IV, page 364 section V) disclose "a processing module interconnected with the DCA and which calculates at least a first variance statistic...and the second variance statistic being a variance statistic of the first set of measurements". Morris et al. (pages 361-363 sections III and IV) disclose "a comparison module interconnected with the processing module and which compares the first variance statistic with at least the second variance statistic ...predetermined relationship exists between the first variance statistic and the second variance statistic".

As per claim 2, Morris et al. (pages 361-362 sections II, III and IV) disclose the feature of this claim.

As per claim 3, Morris et al. (pages 361, 362 sections III, IV) disclose the feature of this claim.

As per claim 4, Morris et al. (page 360 section II, page 364 section V) disclose the feature of this claim.

As per claim 9, Morris et al. (figures 3, 7, 8) disclose the feature of this claim.

As per claim 10, Morris et al. (page 361 sections II and III) disclose both the first and second collecting steps. Morris et al. (page 361 sections III and IV, figures

1-3) disclose both the first and second calculating steps. Morris et al. (pages 361-363 sections III and IV) disclose the comparing step.

As per claim 11, Morris et al. (pages 361-362 sections II, III and IV) disclose the features of this claim.

As per claim 12, Morris et al. (pages 361, 362, sections III, IV) disclose the feature of this claim.

As per claim 13, Morris et al. (page 364 section V) disclose the feature of this claim.

As per claim 14, Morris et al. (pages 361, 362 sections III, IV) disclose the feature of this claim.

As per claim 18, Morris et al. (figures 8, 9) disclose the features of this claim.

As per claim 19, Morris et al. (figures 1-9) disclose the feature of this claim.

As per claim 20, Morris et al. (page 361 sections II and III) disclose both the first and second collecting steps. Morris et al. (page 361 sections III and IV, figures 1-3) disclose both the first and second calculating steps. Morris et al. (figures 3, 7, 8) disclose the displaying step.

As per claim 21, Morris et al. (page 360 section II, pages 361 sections II and III, page 364 section V) disclose "at least one data collection agent (DCA) located on a network and which collects performance data....each measurement of the first plurality of measurements taken at a different time". Morris et al. (page 361 section III,

pages 361-364 section IV, page 364 section V) disclose "a processing module interconnected with the DCA and which calculates at least a first variance statistic...the second variance statistic being a variance statistic of the first set of measurements". Morris et al. (figures 3, 7, 8) disclose "a user display for displaying at least the first variance statistic and the second variance statistic".


11. The following references are cited as being art of general interest: Ding et al. (6,564,174) which determines in a computer system whether a set of data points exhibit a high variance, Chiu et al. (6,701,363) which disclose deriving web transaction performance metrics and McGee et al. (6,643,613) which disclose monitoring performance metrics.

12. No claims are allowed.

13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Hal D Wachsman whose telephone number is 571-272-2225. The examiner can normally be reached on Monday to Friday 7:00 A.M. to 4:30 P.M..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Marc Hoff can be reached on 571-272-2216. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Hal D Wachsman
Primary Examiner
Art Unit 2857

HW
June 27, 2004